

No. 44145-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOHN LEE BURNS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary Tabor, Judge  
Cause No. 09-1-01927-8

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BRIEF OF RESPONDENT

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## **A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. Whether Burns is precluded from claiming the error because it is being raised for the first time on appeal.

2. Whether the court abused its discretion to either apply or not apply the burglary anti-merger statute when calculating Burns's offender scores.

3. Whether, had the court applied the burglary anti-merger statute it would have found that the burglary and robbery convictions constituted the same criminal conduct.

4. Whether Burns had the burden to demonstrate to the court that his crimes constituted the same criminal conduct.

## **B. STATEMENT OF THE CASE.**

The State accepts Burns' statement of the case.

## **C. ARGUMENT.**

1. Burns is precluded from raising the error for the first time on appeal because it does not concern a manifest error affecting a constitutional right.

The general rule is that a reviewing court will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). RAP 2.5(a) reads in part:

(a) Errors raised for first time on review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court

jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

Under this rule, to raise an error for the first time on appeal the error must be "manifest" and truly of constitutional dimension. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected his trial rights and whether the error is "obvious on the record." State v. Fraser, 170 Wn. App. 13, 27-28, 282 P.3d 152, 160 (2012) review denied, 176 Wn.2d 1022, 297 P.3d 708 (2013). It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688. Burns has not suffered any "actual prejudice" from the calculation of his offender scores for two reasons: (1) Burns has failed to identify a constitutional error that affected his trial rights; and (2) the error is not "obvious on the record." Fraser, 170 Wn. App. at 27-28.

Courts will also look at the merits of the claim to see if it has a "likelihood of succeeding" to determine whether the constitutional error is manifest. State v. Sanchez, 122 Wn. App. 579, 590-591, 94 P.3d 384 (2004) (quoting WWJ Corp., 138 Wn. 2d at 603)). The

following arguments also demonstrate that Burns does not have a likelihood of succeeding on his claim of error because the trial court was quite limited in its determination whether burglary and robbery could be counted as one crime for the purposes of calculating the offender score.

2. The court did not abuse its discretion in calculating Burns's offender scores without applying the burglary anti-merger statute.

Burns argues that the trial court's calculation of his offender scores was based upon untenable grounds because it should have taken into consideration that the first degree burglary offense constituted the "same criminal conduct" as the first degree robbery, counting the burglary and robbery as one crime for calculating Burns's offender scores under the burglary anti-merger statute. RCW 9A.52.050; Appellant's Opening Brief at 7; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Here the burglary and the robbery did not involve the same victims and thus cannot constitute the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159

Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Dixon, 159 Wn.2d at 75-76. A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” Dixon, 159 Wn.2d at 75-76.

The burglary anti-merger statute permits courts to punish separately any other crime occurring in the course of a burglary. State v. Davis, 90 Wn. App. 776, 782-783, 954 P.2d 325 (1998). RCW 9A.52.050 reads:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

Under this statute, courts are allowed the discretion to determine whether or not to merge offenses occurring in the course of a burglary for purposes of calculating a defendant’s offender score. Lessley, 118 Wn.2d at 782. The Washington Supreme Court and Division Two of the Court of Appeals have concluded



that courts have this discretion even when offenses constitute the “same criminal conduct.” Davis, 90 Wn. App. at 783 (quoting Lessley, 118 Wn.2d at 778); State v. Kisor, 68 Wn. App. 610, 618, 844 P.2d 1038 (1993), review denied 121 Wn.2d 1023).

Under RCW 9.94A.589(1)(a), when sentencing on two or more current offenses, if “some or all of the current offenses encompass the same criminal conduct” they may be counted as one crime. RCW 9.94A.589(1)(a); Vike, 125 Wn.2d at 410. Finding “same criminal conduct” requires that two or more crimes have the (1) same objective criminal intent, (2) occurred at the same time and at the same place, and (3) involved the same victim. RCW 9.94A.589(1)(a); Lessley, 118 Wn.2d at 778. While the burglary and robbery appear to have had the same objective criminal intent and occurred at the same time and place, nevertheless they did not involve the same victims. CP 22-27. The absence of any one of the elements precludes a finding of “same criminal conduct” and multiple offenses cannot be counted as one crime. Lessley, 118 Wn.2d at 778.

Burns claims that the burglary and robbery had the same victims. Appellant’s Opening Brief at 9. The State disagrees. In Davis, the defendant entered an apartment occupied by Anthony

and Milton and pointed a gun at Milton; the court found that Anthony and Milton were both victims of the burglary, but only Anthony was the victim of assault. Davis, 90 Wn. App. at 782. Contrary to Burns's claim "two crimes cannot be the same criminal conduct if one involves two victims and the other only involves one." Davis, 90 Wn. App. at 782. Accordingly, the victims of a burglary include the occupants of a residence and their guests. State v. Davison, 56 Wn. App. 554, 559-560, 784 P.2d 1268. It follows that the victims of the burglary included everyone that was present in the residence at the time of Burns's entry:<sup>1</sup> Dodge, Oatfield, Nick and Aaron Ormrod, Jones, Moore, and Burgess. CP 22-24. The sole victim of the robbery, however, was Dodge. CP 22-24, 32-44; Lessley, 118 Wn.2d at 778-779.

Since the two crimes do not constitute the "same criminal conduct," the court was, then, limited in making a discretionary determination because regardless of whether or not the burglary anti-merger statute was applied, counting first degree burglary and first degree robbery as one crime was precluded under RCW 9.94A.589(1)(a).

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<sup>1</sup> Occupants of the residence: Dodge, Oatfield, Nick Ormrod, and Aaron Ormrod. Guests of the occupants: Jones, Moore, and Burgess.

The calculation of Burns' offender scores without the application of the burglary anti-merger statute is a proper exercise of discretion. The calculation is based on tenable grounds and for tenable reasons since the burglary and robbery would be treated as separate crimes under either statute, thereby arriving at a decision within the range of acceptable choices. Dixon, 159 Wn.2d at 75-76. Additionally, the decision the court arrived at is not manifestly unreasonable since, even if the burglary anti-merger statute were considered and the court sought to apply it, first degree burglary and first degree robbery do not constitute the same criminal conduct under RCW 9.94A.589(1)(a). Dixon, 159 Wn.2d at 75-76.

In Wachsmith, the court found that "there is no requirement [for the] court [to] provide written or oral reasons for imposing statutorily mandated consecutive sentencing." State v. Wachsmith, 23 Wn. App. 283, 284-285-286, 595 P.2d 64 (1979). Some statutes do require the court to make clear its reasoning. For example, the statute governing exceptional sentences requires that "whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. However, neither RCW 9.94A.589(1)(a) nor 9A.54.050 require the court to enter

formal findings of fact or conclusions of law to support its exercise of discretion and sentencing. Wachsmith, 23 Wn. App. at 286. Under those circumstances, the lack of written or oral reasons for the calculation of the offender scores, and consequently the sentence, is not error because it is consistent with RCW 9.94A.589(1)(a) and 9A.54.050. Wachsmith, 23 Wn. App. at 286.

3. Had the court explicitly applied the burglary anti-merger statute, it would not have found that burglary and robbery convictions merged and Burns' offender score would not change.

For the foregoing reasons, the burglary and robbery did not constitute the "same criminal conduct" under RCW 9.94A.589(1)(a) and cannot be counted as one crime. Vike, 125 Wn.2d at 410; Lessley, 118 Wn.2d at 778. By counting the burglary and robbery convictions separately, the offender score for First Degree Kidnapping would not change, and the actual time Burns would serve would not be reduced. CP 55-60.

4. Burns failed to carry his burden of proving that burglary and robbery should merge.

The burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219

(2012) (quoting State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)). A “same criminal conduct” finding favors the defendant by lowering the offender score below the presumed score. Graciano, 176 Wn.2d at 539 (citing State v. Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007)). Thus, because finding “same criminal conduct” favors the defendant, “it is the defendant who must establish [that] the crimes constitute the same criminal conduct.” Graciano, 176 Wn.2d at 539. The same reasoning should apply to the burglary anti-merger statute; Burns had the burden to convince the court that the burglary and robbery involved the same objective criminal intent, same time and place, and the same victim, and should merge when calculating his offender score. Graciano, 176 Wn.2d at 540. Burns has failed to do so. Therefore, this court need not consider his argument.

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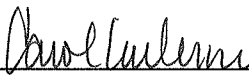
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**D. CONCLUSION.**

The trial court did not err by failing to either apply or refrain from applying the burglary anti-merger statute. Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm the trial courts calculation of Burns's offender scores and his sentence.

Respectfully submitted this 30<sup>th</sup> day of May, 2013.

  
\_\_\_\_\_  
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# THURSTON COUNTY PROSECUTOR

**May 31, 2013 - 8:04 AM**

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